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No. 07-534

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MATTHEW A. CRAIG,

Petitioner,

v.

JOHN BRIGADIER; SUSAN M. BRIGADIER; DAVID L. BRIGADIER; JACQUELYN F. LENSON; RISER FOODS COMPANY, d/b/a GIANT EAGLE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether or not this Court should grant review of this routine hybrid §301 action in which the lower courts correctly applied this Court's ample precedent in finding that Plaintiff's claims are completely preempted?

II. Whether or not this Court should grant review in this case despite Plaintiff's inability to identify any divergence among the Circuit Courts of Appeals from this Court's ample precedent in the area of preemption?

III. Whether or not this Court should grant review in this case even though Plaintiff's claims would undermine the well-settled deference that is to be accorded to labor arbitration awards?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The parent Company of Riser Foods Company d/b/a Giant Eagle is Giant Eagle, Inc. There is no publicly held Company that owns 10% or more of its stock.

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STATUTES AND RULES INVOLVED

The pertinent statutes and rules are printed in Respondent's Appendix 1-8.

COUNTERSTATEMENT OF THE CASE

On July 20, 2004, Plaintiff filed his initial Complaint in state court alleging that he was discharged from Giant Eagle and further claiming defamation and interference with contract resulting from an internal sexual harassment charge filed by Defendant John Brigadier, a minor employee of Defendant Giant Eagle. On August 5, 2004, Craig amended the Complaint to name John Brigadier's parents, David and Sue. Also named as a Defendant was Giant Eagle Human Resources Manager, Jackie Lenson. Pursuant to 28 U.S.C. §§1441, 1446, 28 U.S.C. Section 1331, and 29 U.S.C. §185, Defendants timely removed the case to District Court on the grounds that Plaintiff's claims were completely preempted under §301 of the Labor Management Relations Act under well established Supreme Court and Sixth Circuit authority. On September 14, 2004, Plaintiff filed his Motion to Remand. (R. 7).

On January 14, 2005, Plaintiff filed a Motion to Proceed with Discovery. (R. 13). Defendants opposed that motion on January 24, 2005, arguing that Craig had not demonstrated how discovery would impact determination of the legal question of complete preemption. (R. 14). On May 23, 2005, the District Court

entered its Mem orandum and Order Denying Plaintiff's Motion to Remand the Case, Denying the Motion to Proceed with Discovery, and setting a Case Management C nference for July 15, 2005. (R. 20) (Pet. Suppl. App x. 11-19). Pursuant to Federal Rule of Civil Procedure 26(d), discovery was stayed before the Case Managem nt Planning Meeting. On July 19, 2005, Defendan ts filed their Motion for Summary Judgment and a Motion for Protective Order to Stay Discovery Pend ing Ruling Upon Their Motion for Summary Judgm nent. (R. 25-27).

On March 3 0, 2006, the Court entered its Memorandum and Or der granting Defendants' Motion for Summary Judg nent and, denying as moot Defendants' Motion f r Protective Order. (R. 50-51) (Pet. Suppl. Appx. 1- 0). The Court ruled that Plaintiff's claims were cor npletely preempted and that Craig had failed to pr ove any Union misconduct in representing him, a necessary predicate for a breach of duty of fair repr sentation case. (Pet. Suppl. Appx. 9). The Court share d

> its determir ation that facts of Craig's case bear more than a passing resemblance to those in *De Coe v. General Motors Corporation*, 32 F.3 d 212, 216 (6th Cir. 1994), and *Jones v. Gen eral Motors Corp.*, 939 F.2d 380, 383 (6th Ci . 1991), cases in which the discharged pl intiffs raised claims such as defamation, tortious interference, and intentional inflic ion of emotional distress. The Sixth Circu t upheld the finding of preemption in tho e cases; the provisions of the

> L.M.R.A. must likewise govern the resolution of Craig's claims.

(Pet. Suppl. Appx. 9). The District Court found that Plaintiff's claims required interpretation of the collective bargaining agreement *Craig v. Brigadier*, No. 1:04-CV-1741, slip op. at 4-5 (N.D. Ohio March 30, 2006). (Pet. Suppl. Appx. 7). Plaintiff timely filed his Appeal. On June 4, 2007, the Sixth Circuit Court of Appeals upheld the decision of the District Court and denied a petition for rehearing on July 10, 2007. (Pet. Appx. 1-12).

STATEMENT OF THE FACTS

This case is simply an effort by a former union employee of Giant Eagle to attack collaterally his discharge from employment for gross insubordination. Plaintiff sued not only his former employer, but also its H.R. Manager, an employee who had complained about his inappropriate conduct, and even the boy's parents who he erroneously believes lodged a complaint with Giant Eagle on their son's behalf. Despite a final and binding Arbitrator's Award sustaining Plaintiff's discharge for insubordination, Craig nonetheless sought damages despite the fact that each and every one of his causes of action require interpretation of the Collective Bargaining Agreement which governed the terms and conditions of Plaintiff's employment at Giant Eagle.

Plaintiff Matthew A. Craig's employment with Defendant Giant Eagle was, at all relevant times, covered by a Collective Bargaining Agreement ("Agreement" or "CBA") between the Cleveland Food Industry Committee (Clerks) and United Food & Commercial Workers Union, Local No. 880. (Director of Human Resources Jean Colarik Declaration at ¶¶3-5). (R. 9, 11) (Resp. Appx. 10-21, excerpts from CBA). The Agreement includes provisions pertaining to management rights to set work rules and regulations, working conditions, seniority, and a binding grievance procedure. (R. 9, 11; Colarik Declaration at ¶10). In particular, *Article II – Management Rights* permits the Company to establish and maintain reasonable rules and regulations covering the operations of the store (Resp. Appx. 10-11). *Article IV – Working Conditions, Section 5* provides that employees may be required to acknowledge their familiarity with Company policy (Resp. Appx. 12). *Article IV – Working Conditions, Section 11(a)* provides that no employee shall be disciplined or discharged without just cause (Resp. Appx. 14). *Article V – Seniority, Section 8* provides that seniority shall be terminated or broken if an employee is discharged for just cause (Resp. Appx. 17). *Article XV – Grievance Procedure* provides for a four step grievance procedure culminating in final and binding arbitration. (R. 9, 11; Colarik Declaration at ¶10; Ex. 1) (Resp. Appx. 18-21). That grievance procedure is the exclusive method for resolving disputes relating to the Collective Bargaining Agreement. Article XV, Section 1 provides:

> Should any dispute or grievance arise under this Agreement, it shall be settled in accordance with the procedure set forth in this Article, and, except as otherwise specifically provided in this Agreement, this procedure is the sole and exclusive method of disposing of such grievances.

Article XV, Section 3 provides:

> The arbitrator's decision shall be issued within thirty (30) days after the dispute or grievance is submitted to the arbitrator and shall be final and binding upon the Employer, the Union, and the employee or employees involved.

Pursuant to express authority under the Agreement, Giant Eagle implemented a work rule that insubordination is grounds for discharge, and a sexual harassment policy, a mechanism for employees to complain to Giant Eagle if they believe they were subjected to sexual harassment, and a procedure for investigating such claims. (R. 9; Colarik Declaration at ¶¶12, 13 and 14; Exs. 3-4) (Resp. Appx. 23-32).[1] The Giant Eagle Policy also provides under "Disciplinary Action" that, "If it is determined that inappropriate conduct has been committed by one of

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[1] Pursuant to the Agreement, Matthew A. Craig signed an Acknowledgment of Familiarity with the Giant Eagle Handbook with its Policies and Procedures. (R. 9; Colarik Declaration at ¶11) (Resp. Appx. 22).

our employees, we will take such action as is appropriate." (R. 9; Colarik Declaration ¶12; Ex. 3) (Resp. Appx. 29-30).

On June 24, 2004, John Brigadier, who was then seventeen years old, lodged a complaint of sexual harassment against Plaintiff based upon Craig's statement to him, "Do you like girls?" Plaintiff admits making this statement. (R. 26; Lenson Declaration at ¶¶1, 4-5). (R. 26, Arbitrator's Decision) (Resp. Appx. 52). Pursuant to the Company's sexual harassment policy (as well as applicable law), Giant Eagle had the duty to investigate the claim promptly. (R. 9; Sexual Harassment Policy; Colarik Declaration filed October 1, 2004; Ex. 3, pp. 61-64) (Resp. Appx. 23-30).

After Defendant John Brigadier lodged the complaint of sexual harassment and after investigating that claim and other employee claims of harassment against Craig, the Company removed his title of "Manager-In-Charge" with no loss of pay. (R. 9; Colarik Declaration at ¶12).[2] Subsequently, on June 30, 2004, the Company held a meeting in response to Plaintiff's request to discuss the handling of the complaints against Craig by the Store H.R. Manager, Jackie Lenson. The meeting was attended by Larane

[2] Prior to the lawsuit, at no time did either of John's parents – David and Sue Brigadier have any contact with anyone at Giant Eagle regarding Plaintiff. (R. 26; ¶6 of David Brigadier and Sue Brigadier Declarations).

Hulsman, Vice President and Manager of Employee Relations, and Plaintiff. While Ms. Hulsman was reviewing the content of the sexual harassment charge that had been levied against him, Craig stated that the meeting was over and he started to leave. Ms. Hulsman said the meeting was not over and warned him that if he left the meeting, it would be considered insubordination, a terminable offense. Despite the warning, Matthew Craig then left the meeting and was discharged for insubordination. (R. 26, Arbitrator's Decision, Resp. Appx. 66, R. 9; Colarik Declaration at ¶13; R. 9; Hulsman Declaration at ¶¶3-6).

On July 13, 2004 (before he filed his Complaint in state court), Craig filed a grievance pursuant to the CBA challenging his demotion and termination from employment, and in which he made the following claims:

- that he was wrongfully discharged for stating that he might seek legal redress for alleged defamatory statements made against him by other employees of Giant Eagle (Grievance ¶9a);
- that the manner in which Giant Eagle management and human resource personnel handle sexual harassment claims was wrongful (Grievance ¶9c);
- that Giant Eagle management should change its criteria for assessing the legitimacy of sexual harassment claims; and that Giant

Eagle improperly "processes" such claims (Grievance ¶9c); and

- that his termination violated the "just cause" requirement of the Agreement (Grievance ¶ 10).

Craig demanded reinstatement and lost wages. (R. 9; Colarik Declaration at ¶15; Ex. 5, ¶¶9, 9a, 9b, 9c, 10; and demand for relief in grievance) (Resp. Appx. 35-37).

Pursuant to Article XV of the Agreement, the Union, the Plaintiff, and store management personnel met for a grievance meeting on July 27, 2004, and the Company denied the grievance.[3] The parties met again subsequently, and the Company again denied the grievance. Arbitration is the final and binding step under the exclusive grievance machinery to resolve "any dispute" under the Agreement. (R. 9, 11; Colarik Declaration at ¶¶16-19; Ex. 1, Article XV, Sections 1 and 3 CBA, p. 41) (Resp. Appx. 18, 20).

On July 20, 2004, Plaintiff filed his Complaint which he amended on August 5, 2004. (R. 1; Notice of Removal; Exs. F and I). In his First Amended Complaint ("FAC") (Pet. Appx. 14-30), Plaintiff alleges that he was discharged from Giant Eagle on July 1, 2004 (R. 1; FAC, ¶11); that up until June 25, 2004, he had never been subjected to disciplinary action by

[3] At this meeting, Plaintiff modified the grievance to delete all claims other than the contention he was discharged without just cause. (R. 9; Colarik Declaration; Ex. 8).

Giant Eagle (FAC, ¶12); that he is currently appealing his discharge and other alleged contractual violations which are subject to the Collective Bargaining Agreement between Defendant Giant Eagle and Local 880 (FAC, ¶16); and that Defendant Lenson, Human Resources Manager, upon learning of unsubstantiated allegations made against Plaintiff by employee John Brigadier and his parents Sue and David Brigadier, in the scope of her employment, "perpetuated {sic} the defamatory allegations against Plaintiff." (FAC, ¶¶37-39). Plaintiff lodged similar allegations against Defendant Lenson for slander in connection with publication of accusations of sexual harassment. (FAC, ¶¶43-46). Plaintiff also alleged that at the same time Lenson published the sexual harassment claims against Craig that she also orally accused him of voyeurism. (FAC, ¶¶48-50). Plaintiff further alleges that John Brigadier defamed him by accusing him of sexual harassment (FAC, ¶¶17-23); that David and Sue Brigadier (John's parents) defamed him (FAC, ¶¶24-34); that John Brigadier tortiously interfered with his employment/contractual relationship resulting in Plaintiff's demotion and discharge by Giant Eagle (FAC, ¶¶63-65); that David and Sue Brigadier tortiously interfered with employment/contractual relations resulting in Plaintiff's demotion and discharge by Giant Eagle (FAC, ¶¶66-69).

Plaintiff further alleges that Defendant Giant Eagle ratified and condoned Lenson's alleged slanderous and libelous actions (FAC, ¶¶52-54) and that the alleged defamation caused injury in the form of

ridicule and degradation of his reputation which has in turn resulted in his demotion and loss of employment. (FAC, ¶¶75-77). Craig further alleges that the concerted actions of the Brigadiers, Lenson, and employees of Giant Eagle have caused personal, professional, and financial injury to Plaintiff, including his demotion and subsequent discharge by Defendant Giant Eagle. (FAC, ¶78-80). All fourteen of the allegations in the complaint allege calculation to injure Plaintiff's contractual relationship with Giant Eagle and/or that Plaintiff suffered demotion, loss of employment, or discharge by Giant Eagle. (FAC, ¶¶22, 29, 33, 40, 45, 49, 57, 61, 65, 69, 74, 75-77, 78-80).[4]

On March 25, 2005, Plaintiff's grievance was heard in an arbitration hearing. On June 22, 2005, the Arbitrator issued her holding that Plaintiff was discharged for just cause (R. 26; Arbitrator's Decision, Resp. Appx. 69), that much of his testimony was not credible (R. 26; Arbitrator's Decision, Resp. Appx. 64-65,69), that he violated an explicit instruction and was guilty of insubordination (R. 26; Arbitrator's Decision, Resp. Appx. 66), that he would not benefit from progressive discipline (R. 26; Arbitrator's

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[4] Petitioner does not describe these multiple references to demotion, loss of employment and discharge in his description of the facts at page 5 of his petition. Moreover, contrary to Petitioner's assertions, he does allege discharge claims against Giant Eagle. See FAC, 75-77, alleging that Giant Eagle's actions resulted in loss of his employment.

Decision, Resp. Appx. 67-68), that his act of direct insubordination was very serious and interfered with the Company's business purpose of counseling him (R. 26; Arbitrator's Decision, Resp. Appx. 68), and that the Plaintiff had turned a deaf ear to all efforts to critique him (R. 26; Arbitrator's Decision, Resp. Appx. 67-68).

REASONS WHY THE PETITION SHOULD BE DENIED

I. Plaintiff's Claims Are Completely Preempted

This is a routine "hybrid §301 action"[5] in which Plaintiff seeks to evade an arbitration decision upholding his discharge for insubordination through artful pleading of purported state law claims. However, as the courts below properly recognized, his claims are completely preempted.

This Court has long recognized the broad preemptive powers of §301. *See Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 558-560 (1968) (plaintiff's action for breach of collective bargaining agreement arose under §301 and was removable even though the complaint did not mention federal law and appeared to plead an adequate claim under state contract law), as described in *Livadas v. Bradshaw*, 512 U.S. 107,

[5] Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (hereinafter referred to as "§301"); *see Reed v. United Transportation Union*, 488 U.S. 319, 329-330 (1989).

122 n.16 (1994). *See also Beneficial National Bank v. Anderson*, 539 U.S. 1, 8 (2003) ("When the federal statute completely pre-empts the state law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law."); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1997) ("On occasion, the Court has concluded that the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well pleaded complaint rule.'" (citation omitted)); *Franchise Tax Bd. Of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23-24 (1983) (§301 has an unusually powerful preemptive force); and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 n.3 (1988) (" . . . issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy").

In *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213, 220 (1985), this Court held that claims are preempted when they are "inextricably intertwined with consideration of the terms of the labor contract" or are "substantially dependent" on it. There, the plaintiff alleged bad faith processing of an insurance claim under state law, but the Court held no matter how labeled, the claim was for a breach of a collective bargaining agreement. "[A]ny other result would elevate form over substance." *Allis-Chalmers*, 471 U.S. at 211-213. In *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987), this Court reaffirmed that §301 governs claims founded directly on rights created by

collective bargaining agreements, and also claims "substantially dependent on analysis of a collective bargaining agreement," citing *Allis-Chalmers*, 471 U.S. at 220. *See also Lingle*, 486 U.S. at 410.[6] In *Lingle*, the Court went on to say that, "Today's decision should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor management relations only if such questions do not require construing collective bargaining agreements." *Lingle*, 486 U.S. at 411. Similarly, in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994), the Court once again affirmed the complete preemption doctrine holding, "[this Court has] recognized that where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is preempted." (citing *Lingle*, 486 U.S. at 405-406, *Allis-Chalmers*, and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)).

Applying these basic principles, it is apparent that the District Court and the Court of Appeals correctly determined that Plaintiff's claims are

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[6] Petitioner acknowledges at page 14 of his Petition that the complete preemption doctrine covers complaints asserting rights created by a collective bargaining agreement or which allege "claims substantially dependent on CBA terms." Thus, he misstates the law when he asserts at page 13 of his Petition that, "Where adjudication of a state-law claim does not absolutely require interpretation of the meaning of a CBA term, the claim is 'independent' of the CBA and is not subject to LMRA preemption."

completely preempted no matter how labeled. Plaintiff's claims are in reality claims for wrongful discharge and demotion which require interpretation of the Agreement. Plaintiff's Complaint is replete with references to demotion, loss of employment, tortious interference with his contract, and discharge – all of which are governed by the terms of the CBA. Indeed, Plaintiff himself recognized that the purported state law claims that he now asserts in this case are intertwined with the collective bargaining agreement when he incorporated those same claims in his initial grievance challenging his discharge stating, "The following statements are made pursuant to the grievance procedure contained in Article XV of the collective bargaining agreement." (Resp. Appx. 35-40).

More particularly, all of Plaintiff's claims – which are variously styled as defamation, tortious interference, and conspiracies to defame and tortiously interfere – allege that Defendant's actions resulted in his discharge and loss of employment or injury to his contractual relationship with Giant Eagle. Those allegations necessarily require the Court to examine the causal connections, if any, between the alleged actions and his discharge. In order to conduct that examination, the Court must necessarily scrutinize the reasons for his discharge and their sufficiency under the CBA. In addition, this Court must determine the appropriate effect of the outcome of the grievance and arbitration procedure, and in particular the controlling impact of the Arbitrator's decision that Plaintiff was properly

discharged for his own insubordination, and not due to any of the actions of Defendants who he alleges accused him of sexual harassment. In other words, the Court must review the standards for discharge under the CBA, the policies issued pursuant to the CBA, the sufficiency of the reason for Plaintiff's discharge under those policies and the CBA, the scope of the grievance and arbitration procedure under the CBA, and the impact of an arbitrator's decision reached under that CBA. Plaintiff's claims are thus hopelessly and "inextricably intertwined" with the CBA.

In addition, each of the state law theories advanced by Plaintiff to attack his discharge are clearly preempted because the elements he must prove are intertwined with the CBA. As to his defamation claim concerning alleged reports that he had engaged in sexual harassment, he must prove "an unprivileged publication to a third party," and "fault amounting to at least negligence on the part of the publisher." *Akron-Canton Waste Oil v. Safety Kleen Oil Servs. Inc.*, 81 Ohio App. 3d 591, 601, 611 N.E.2d 955, 962 (9th Dist. 1992); *Lawson v. AK Steel*, 121 Ohio App. 3d 251, 256, 699 N.E.2d 951, 954 (1997). In order to evaluate these elements, the Court must interpret the Company's right under the CBA to implement the sexual harassment policy, the reasonableness of that policy, and the Defendants' application of that policy to determine whether any of the alleged reports were "unprivileged" and at "fault."

Similarly, with respect to Plaintiff's claims of tortious interference with contract, he must under Ohio law prove breach of the underlying contract. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 650 N.E.2d 863, 864 (1995).[7] Here, the underlying contract is the CBA, and the Court must obviously interpret its terms to determine whether or not it has been breached – just as the Arbitrator has already done. *See Fox v. Parker Hannifin Corp.*, 914 F.2d 795 (6th Cir. 1990) (holding that tortious interference with contract claims are preempted if breach of contract is an essential element of the claim under state law.) Therefore, this claim is plainly preempted.

Plaintiff's attempts to avoid this manifest preemption by instead trying to rely upon interference with business relations fails for at least two reasons. First, the "business relations" involved here are governed by and set forth in the CBA, and the claim is therefore preempted. Second, under Ohio law, the tort of interference with business relations does not lie when the business relations have already been reduced to a contract: "The main distinction between tortious interference with a contractual relationship and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective

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[7] *Kenty* is the decision of the Ohio Supreme Court establishing the tort of interference with contract in Ohio. Yet Plaintiff has carefully avoided citing it in his Petition to this Court. *See Petition* at 19 n.6.

contractual relations not yet reduced to a contract." *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distributing Co., Inc.*, 148 Ohio App.3d 596, 604, 774 N.E.2d 775, 780-781 (3d Dist. 2002). Therefore, Plaintiff cannot escape the need to prove breach of the CBA and preemption by relabeling his tortious interference with contract claims as one for interference with business relations.

Plaintiff's conspiracy theories are not independent causes of action but are merely derivative of his claims for defamation and interference with contract. Under Ohio law, "a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action." *Minarik v. Nagy*, 8 Ohio App.2d 194, 195, 193 N.E.2d 280, 281 (8th Dist. 1963). Indeed, Plaintiff captioned those claims as "Civil Conspiracy to Defame" and "Civil Conspiracy to Tortiously Interfere with Employment/Contractual Relationship." Therefore, these conspiracy claims are preempted for the same reasons as his basic tort claims.

Finally, Plaintiff is simply wrong in his condescending assertion that claims against third parties cannot be preempted: "The notion that the LMRA cannot preempt a claim against a defendant where the defendant is not a party to a CBA should not come as a difficult concept." (Petition at 30). Indeed, the very case he cites in support of that proposition holds precisely the opposite. In *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 997 F.2d 895, 899 (4th Cir. 1992), the Court held that a

claim against a non-signatory to a collective bargaining agreement for interference with contract is preempted where the state law requires a breach or termination of the contract as an element of the claim. Similarly, in *Kimbro v. Pepsico*, 215 F.3d 723, 727 (7th Cir. 2000), Judge Posner noted that state claims against third parties that require interpretation of collective bargaining agreements are preempted. Any other rule would suddenly allow collective bargaining agreements to be interpreted in state courts rather than in labor arbitration. Therefore, there is nothing "difficult" or unusual about the concept that such claims are preempted.

II. Plaintiff Has Mischaracterized the Decisions of the Sixth Circuit Court of Appeals and Has Not Remotely Established the Existence of a Conflict Among the Circuits.

In his zeal to seek review, Plaintiff has ignored the foregoing analysis demonstrating that the elements he must prove as part of his asserted state law claims result in preemption because they are intertwined with the CBA. Instead, he erects without foundation extreme mischaracterizations of Sixth Circuit decisions that correctly applied this Court's holdings on §301 preemption. For example, he contends that "in the Sixth Circuit's view, the mere existence of a collective bargaining relationship between the parties is sufficient to entangle any claims between the parties in the quagmire of LMRA preemption." (Petition at 17). He accuses the Sixth

Circuit in *DeCoe v. General Motors Corp.*, 32 F.3d 212 (6th Cir. 1994), of "delv[ing] into a CBA to locate terms that the Defendant might have raised as a defense, or that might have required interpretation if the Plaintiff had pled his claims differently, to determine if a court could resolve the claims without interpreting CBA terms." (Petition at 23). Plaintiff offers no logical basis for these exaggerated claims. He then attempts to create a split among the Circuits by citing cases that are merely factually distinct. (Petition at 20-21, 24). These unsupported mischaracterizations of the opinions of the Sixth and other Circuit Courts of Appeal do not form a basis for granting review.

Neither the Sixth Circuit's decision in this case nor in *DeCoe* are remotely as radical as Plaintiff represents to this Court.[8] On the contrary, as demonstrated above, the Court of Appeals decision in this case is well-founded upon the ample precedent of this Court in the area of §301 preemption. In both this case and *DeCoe*, it was the elements of the state law

[8] Plaintiff's attack on *DeCoe* is unique. A review of Shepard's Citations on Lexis-Nexis and Westlaw's Keycite on November 12, 2007, indicates that no Circuit Court of Appeals decision has rejected or even criticized *DeCoe* which has been cited by courts at least 123 times. Shepard's Citations does incorrectly show a criticism in *Valinski v. Edison*, 197 Fed. Appx. 403, 2006 U.S. App. LEXIS 20052 (6th Cir. 2006), an unreported case, but a review of that opinion shows that the Sixth Circuit was citing *DeCoe* favorably. Thus, none of the Courts of Appeals have recognized any divergence in *DeCoe* or any split among the Circuits in this area of preemption.

claims that a plaintiff must affirmatively prove that resulted in preemption, and in neither case did the Court of Appeals "delve into" a collective bargaining agreement to search for defenses. Indeed, where state law requires proof of a breach of the CBA (the very purpose of labor arbitration) as one of those elements that Plaintiff must prove, it is hardly remarkable that the Court of Appeals found preemption under governing Supreme Court law.

Although Plaintiff claims that some sort of conflict exists among the Circuits, he makes no real effort to tell the Court where that conflict might be. Rather than demonstrating a conflict, he lines up a number of cases that found preemption against a list that did not. He then offers the following bald and unsupported assertion: "The much [sic] of the conflict between the decisions in the above cases arises from the construction of conclusions rather than application of facts to an exacting legal test." (Petition at 24). He thus asks this Court to try to find a conflict among the Circuits even though he cannot. However, even casual review of these cases shows that the distinction between the outcomes is factual: where the elements of the claims are intertwined with the collective bargaining agreements, they are preempted; where the claims are independent from the collective bargaining agreements, they are not. Those factual distinctions do not form a basis to grant review, and this Court should not have been asked to waste its time trying to find a conflict in law when Plaintiff himself has not been able to locate one.

III. This is a Poor Case for Review Because the Record is Clouded by Plaintiff's Efforts to Evade the Labor Arbitration Decision that Found that He Was Properly Discharged for Insubordination.

Like his careful attempt at artful pleading around §301, Plaintiff has artfully avoided informing this Court of the outcome of the arbitration award concerning his discharge grievance. That award confirmed that he was properly discharged for insubordination for walking out on a counseling session concerning his inappropriate behavior. Thus, while the Plaintiff now invites this Court to resolve invented and non-existent differences among the Circuits on preemption, the real "quagmire" that Plaintiff asks the Court to enter is not the doctrine of preemption, but instead the opportunity to undercut the half-century old cornerstone of labor law that rests upon the "Steelworkers Trilogy." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior and Gulf*, 363 U.S. 574 (1960); and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Any decision by this Court to grant review would undercut the sanctity of arbitration as the means of resolving disputes that arise in the collective bargaining setting because Plaintiff's claims are flatly contrary to the decision of the Arbitrator. She found that he was properly discharged for his own insubordinate acts, and not because others complained about his sexual harassment as he alleges. By granting the Petition in

this case, the Court must thus cast aside both the doctrine of collateral estoppel and the respect so long accorded by the Supreme Court and Congress to the labor arbitration process. Plaintiff's evasive conduct and arguments are not the fodder for such a colossal reversal of precedent and national policy.

That national policy favoring labor arbitration requires that appropriate deference be given to the labor arbitration decision in this case. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). That deference is in fact controlling here because all of Plaintiff's claims are barred by the doctrine of collateral estoppel (or "issue preclusion"), the four essential elements of which are as follows: 1) the issue precluded must be the same one involved in the prior proceeding; 2) the issue must actually have been litigated in the prior proceeding; 3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and 4) the prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue. *N.L.R.B. v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 81 (6th Cir. 1985), quoted in *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F.2d 256, 259 (6th Cir. 1991). Here, the Arbitrator found that Plaintiff was properly terminated for violation of the rule against insubordination. (Resp. Appx. 66, 69). The reason for his discharge was in fact litigated before the Arbitrator, its determination was necessary to the outcome, and Plaintiff had a full and fair opportunity to litigate

that issue. Also, it was he who chose to abandon the other claims in his grievance. (Resp. Appx. 51). Therefore, he cannot now be heard to claim that the real reasons for his discharge were the statements and/or conspiracies of the various Defendants about his involvement in sexual harassment. Accordingly, all of his claims are barred.

Moreover, Plaintiff's attempts to plead and to argue around the arbitration decision make this case an extremely poor one for review. The assumed "facts" upon which Plaintiff rests his arguments are false and contradict the decision of the Arbitrator and the actual facts underlying this case. The Arbitrator's decision confirms that his discharge was caused by his own insubordination, yet his Complaint alleges that it was caused by the statements of others concerning his sexual harassment. Thus, Plaintiff's arguments rely upon a confused factual record that cannot withstand scrutiny and cannot be distilled for the purposes of review. This Court's decisions from the Steelworkers Trilogy, *Misco*, and the many decisions on preemption already provide ample testimony to the deference to be accorded to labor arbitration and preemption, and an additional opinion based upon this ambiguous and untidy record is unlikely to offer further refinement or guidance on these landmark principles of federal labor law.

CONCLUSION

There is no reason why this Court should grant the Petition for Writ of Certiorari in this case. In its unpublished opinion, the Sixth Circuit Court of Appeals merely applied well-settled law in concluding that Plaintiff's collateral attack on the arbitration award against him is preempted under §301. That decision does not conflict with any decision of this Court or any other Court of Appeals. Plaintiff has identified no conflict among the Courts of Appeals on the subject of §301 preemption, nor is there any question of federal law presented in this case that has not already been decided by this Court. Accordingly, there is no basis upon which to grant the Petition in this routine §301 action.

Respectfully submitted,

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APPENDIX A – STATUTES AND RULES

29 USC § 185(a)

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§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section

1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the data on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this sub-section and the district court to which it is removed or transferred under section 1407(j) has made

a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over, the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further, review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further,

except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

FRCP 26(d)

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

APPENDIX B

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

AGREEMENT BETWEEN

Cleveland Food Industry Committee (Clerks)

and

United Food & Commercial Workers Union Local No. 880

---

880 *UFCW*

Effective
September 9, 2002

Expiration
September 11, 2005

James B. Jerele
President

Thomas H. Robertson
Secretary-Treasurer

* * *

ARTICLE II
Management Rights

In addition to the management rights specified elsewhere in the Agreement, the management of the business and the direction of the work force, including, but not limited to the right to plan, direct, and control store operations; to establish merchandising and pricing policies; to hire, suspend, or discharge for

just cause; to assign and allocate work; to transfer employees because of lack of work or for other legitimate reasons; to study or introduce new or improved methods or facilities; to establish and maintain reasonable rules and regulations covering the operation of the store; and to carry out the ordinary and customary functions of management are vested exclusively in the Employer, except to the extent modified by this Agreement, and provided further, that the Employer shall not exercise such rights in an arbitrary or capricious manner.

* * *

ARTICLE IV
Working Conditions

Section 1. Head Cashiers and all other Cashiers shall do all book work on Company premises.

Section 2. No employee shall be required to work in two (2) stores in the same day, except in case of permanent transfer, emergency, or mutual consent between the Employer and employee.

Section 3(a). All employees normally scheduled for thirty-two (32) hours or more per week shall be given one (1) week's notice or one (1) week's pay in lieu of notice in the event of a layoff.

Section 3(b). The Employer shall give employees of a store to be closed two (2) week notice of a store closing, and the Union shall receive such notification in advance of the employees, except in the event of an

emergency closing or where the Employer lacked knowledge in sufficient time to give such notice.

Section 4. The Employer shall continue its past practice on providing employees with work apparel and will provide rain gear for employees who perform carry-out service.

Section 5. The Employer may require employees to initial Employer policy and rules to verify that those policies and rules have been read and that the employees are familiar with their contents. Employer policies and rules which employees are required to initial shall be posted in each store and furnished to the Union upon request.

Section 6(a). The Union shall furnish the Employer orientation kits to be distributed to newly hired and rehired employees. All completed forms filled out by new or rehired employees will be forwarded by the Employer to the Union Office immediately upon hire. Such forms are self-addressed, and postage paid by the Union.

Section 6(b). The Employer shall submit to the Union a list of employee terminations, leaves of absence, and permanent transfers with each monthly dues report.

Section 6(c). In January and July of every year, each Employer shall supply the Union with store seniority lists of all employees by classification. In addition, upon request by the Union (not more than semi-annually), a company-wide seniority list is to be

provided which shall include name, date of hire, store, and classification.

Section 7. Union Representatives shall be allowed to enter stores to conduct Union business when the store is open for business or when outside salesmen are in the store.

Section 8(a). The Employer recognizes the right of the Union to select a Steward at each store to represent the employees on grievances concerning the interpretation or application of this Agreement. Union Stewards shall be allowed a reasonable amount of time to perform this function during their regular working hours.

Section 8(b). The Union Steward shall be considered to have the longest seniority for purposes of layoff or in the reduction of scheduled hours.

Section 8(c). Providing there is no disruption of the Employer's operations of business, Union Stewards shall be scheduled for the night off to attend Stewards meetings and the regular area meeting.

Section 8(d). Union Stewards who work the day shift shall have the right to be scheduled the first available shift within their classification within their store.

Section 8(e). No Union Steward shall be transferred, except for incompetency, unless such transfer is agreed to by the Steward or the Union.

Section 8(f). In stores with more than seventy-five (75) employees in the bargaining unit, the Union may appoint one (1) Assistant Steward to act as Steward when the Union Steward is not working. Such assistant shall not be subject to Paragraphs (b), (d), and (e) of this Section.

Section 8(g). The Employer will pay annually up to one (1) day's pay for one Union Steward per store to attend the Local Union's Annual Union Steward Seminar(s).

Section 9. All stores shall provide bulletin board space for Official Union notices signed and approved by an Officer or Union Representative of the Union.

Section 10. The Union and the Employer agree that in the hiring or employment of employees there shall be no discrimination against an employee or against any applicant for employment because of race, sex, creed, national origin, age, or disability. It is also agreed that there shall be no discrimination against any employees who exercise their right to aid and assist the Union or make claims under this Agreement.

Section 11(a). No employee shall be disciplined or discharged without just cause.

* * *

ARTICLE V
Seniority

Section 1. Seniority shall be defined as the length of continuous service of an employee. For a full-time employee, seniority shall be measured within classification on a company-wide basis (unless other areas are agreed upon between the Union and a Company) and shall be measured from the employee's last date of hire. For a part-time employee, seniority shall be measured within classification on a store-wide basis and shall be measured from the employee's last date of hire.

Section 2. No rights or privileges shall be lost by any full-time employee (forty [40] hours per week for six [6] months) because of the changes in language from the 1984-1987 Agreement to the language in this Seniority Article.

Section 3. All new employees shall be on probation for sixty (60) days, and the Employer shall have exclusive control over such probationary employees, including, but not limited to, the right to discipline or discharge.

Section 4. In regard to layoffs and recalls (reinstatement after layoff), an employee's classification seniority shall be considered along with his or her experience and ability to perform the available work, and if all other considerations are reasonably equal, seniority shall be the controlling factor. Provided, that notwithstanding anything to the contrary in this

Article, temporary layoffs (i.e., not longer than one [1] week) shall be on a store-wide basis.

Section 5(a). An employee who normally works thirty-four (34) hours or more per week who suffers a substantial reduction in his or her normal weekly schedule for an extended period of time shall have the right to transfer to another store to displace the least senior employee who is working thirty-four (34) hours or more per week.

Section 5(b). For purposes of this Section, the following definitions shall apply:

1. An employee's normal weekly schedule shall be the hours scheduled during the previous eight (8) weeks, but excluding additional hours that resulted from vacations, illnesses, holidays, new store openings, and similar circumstances that would temporarily inflate an employee's schedule.

2. Substantial reductions are reductions of ten (10) hours or more of a normal weekly schedule.

3. An extended period shall be any period of six (6) weeks or more.

Section 5(c). No right to transfer may arise under this Section until the affected employee submits to the Employer a written request for such transfer and in order to transfer, the employee must be qualified to perform the work within the job classification of the job requested.

Section 5(d). If a mistake is made in the implementation of this Section, the Employer shall not be liable for any back pay if the mistake is corrected within two (2) days after receiving notification from the Union of the mistake.

Section 6. Employees may be transferred for the business needs of the Employer, but the Employer shall make no transfers that are discriminatory, punitive, or arbitrary. When an employee is transferred to a different store, the Employer shall be required to make an effort to assign the employee to a store that is close to his or her home.

Section 7. In cases of temporary transfers for the benefit of the Employer which involve additional transportation costs, the employee shall be reimbursed for the additional expenses at a rate of thirty-one cents ($.31) per mile.

Section 8. Seniority shall be terminated or broken for the following reasons:

a. Voluntary quit;

b. Discharge for cause;

c. Layoff exceeding twelve (12) consecutive months;

d. Failure to report for work within three (3) days after receipt of a written recall notice;

e. Reduction from full-time to part-time status for more than one (1) year (but such an employee's part-time seniority shall be measured from his or her last date of hire).

* * *

ARTICLE XV
Grievance Procedure

Section 1. Should any dispute or grievance arise under this Agreement, it shall be settled in accordance with the procedure set forth in this Article, and, except as otherwise specifically provided in this Agreement, this procedure is the sole and exclusive method of disposing of such grievances.

Step 1.

In order to be considered as a grievance under this Article, a dispute or grievance shall be submitted to the Employer in writing within fourteen (14) days after the occurrence of the incident causing such dispute or grievance, or within fourteen (14) days from the date when the employee or Union became aware or reasonably should have become aware of the incident or events in question, but in no case more than one (1) year from the incident or event giving rise to the dispute.

Step 2.

There shall be an effort on the part of the parties to settle and resolve any dispute or grievance and the Employer shall answer all disputes or grievances in writing within fourteen (14) days after the receipt of same.

Step 3.

If the grievance is not satisfactorily settled in Step 2, the Union has two (2) weeks from receipt of the Step 2 answer to submit a written appeal to an appropriate management administrative official. A meeting shall be held between Employer and Union officials and a final written answer shall be issued by the Employer within one (1) week of the meeting. Provided, that the parties may agree to hold additional Step 3 meetings without loss of rights under this Article.

Step 4.

In the event that the parties are unable to settle or resolve a grievance, the Union may refer the grievance to arbitration by requesting the Federal Mediation and Conciliation Service or the American Arbitration Association to submit a panel of arbitrators. Within fourteen (14) days of receipt of the first panel, the Employer and Union may mutually agree to request the Agency to submit additional panels of arbitrators. The arbitrator shall then be selected in accordance with the Agency's then applicable rules, unless the Employer and the Union agree to select the arbitrator in some other manner.

Section 2. The Union may refer a dispute or grievance which has not been resolved to arbitration on the forty-fifth (45th) day after the dispute or grievance has been submitted in writing to the Employer in Step 1, or at any time thereafter. The Union must

refer a dispute or grievance to arbitration no later than thirty (30) days after the last Step 3 meeting is held.

Section 3. The arbitrators decision shall be issued within thirty (30) days after the dispute or grievance is submitted to the arbitrator and shall be final and binding upon the Employer, the Union, and the employee or employees involved. The expenses of the arbitrator shall be borne equally by the Employer and the Union.

Section 4. The time limits specified in Section 1 above may be extended by mutual agreement but shall otherwise be enforced in that the dispute or grievance shall be decided against any employee or party failing to observe the time limits.

Section 5. In the event a grievance goes to arbitration, this Agreement, including any Supplements or Addenda, shall be the basis on which the arbitrator's decision is rendered, and in reaching his or her decision the arbitrator shall have no authority to amend, modify, or in any way change its terms.

Section 6. At any step in this grievance procedure, the Executive Board of the Local Union shall have final authority in respect to any aggrieved employees covered by this Agreement to decline to process further a grievance, complaint, disagreement or dispute if in the judgment of the Executive Board such grievance or dispute lacks merit or justification under the terms of this Agreement, or has been adjusted or rectified under the terms of

this Agreement to the satisfaction of the Union Executive Board.

Section 7. In the investigation and processing of a dispute or grievance, the Union and the Employer shall upon request provide each other all relevant and pertinent records, papers, and data including the names of any and all witnesses whose testimony would have bearing on the grievance, except where a failure to follow established check-out procedure may be involved or where the security of the Union and/or the Employer would be at issue.

* * *

APPENDIX C

SEXUAL HARASSMENT POLICY AND WORK RULES AND PETITIONER'S ACKNOWLEDGEMENT OF RECEIPT

DEFENDANT'S EXHIBIT 2

Handbook Acknowledgement Statement

Human Resources Retail –
New Hire Training Program
Employee Acknowledgement Statement

Description: Acknowledgement of receipt of the Giant Eagle Employee Handbook and an affirmation that the New Hire understands that violation of the Company's Policies and Procedures can result in termination.

TO: Giant Eagle

This is to acknowledge that I have received and read the Giant Eagle Employee Handbook.

It is my understanding that any violation of the Company's Policies and Procedures can make me subject to various disciplinary actions up to, and including, termination.

I understand that I am expected to, and will, observe and abide by all amended and additional rules and regulations.

/s/ Matthew A. Craig	7/29/03
Employee Signature	Date

NOTE: This is a signed employee statement. One copy will be kept in your personnel file.

This booklet is for personal reference and is yours to keep.

DEFENDANT'S EXHIBIT 3

EMPLOYEE HANDBOOK

SEXUAL HARASSMENT POLICY

Summary

Giant Eagle will promote a workplace that is free of sexual harassment.

Giant Eagle is committed to providing a workplace free of sexual harassment. Sexual harassment of employees in the workplace or in other settings in which employees may find themselves in connection with their employment is unlawful and will not be tolerated. Further, any retaliation against an individual who has complained about sexual harassment or retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is similarly unlawful and will not be tolerated. To achieve our goal of providing a workplace free from sexual harassment, the conduct that is described in this policy is prohibited. If such conduct does occur, a procedure to investigate reported incidents has been established and communicated to employees.

Giant Eagle takes allegations of sexual harassment seriously and we will respond promptly to complaints of sexual harassment. Where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary including disciplinary action up to, and including, termination.

Definition of Sexual Harassment

Sexual harassment includes unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature when:

- Submission too rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or a basis for employment decisions.
- Such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.
- Any unwelcome E-mail communication or viewing, downloading or transmitting sexually explicit or offensive material from the Internet also constitutes creating a hostile work environment.

Under these definitions, direct or implied requests by a supervisor for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits or continued employment constitutes sexual harassment.

The legal definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating or humiliating to male or

female workers, whether it is intended or not, may also constitute sexual harassment. While it is not possible to list all examples of sexual harassment, the following list contains additional types of conduct, which, depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness may constitute sexual harassment:

- Unwelcome sexual advances – whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life, commenting on an individual's body, commenting about an individual's sexual activity, deficiencies or prowess;
- Displaying sexually suggestive objects, pictures, cartoons,etc.;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments; and
- Inquiries into one's sexual experiences

Retaliation against an individual who has complained about sexual harassment and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated.

Complaints of Sexual Harassment

If any employee believes that he or she has been subjected to sexual harassment, the employee has the

right to file a complaint with our organization. This may be done in writing, or orally, by contacting Ray Huber, Vice President, Human Resources or anyone on the list below:

COMPANY	PRIMARY CONTACT PERSON(S)
Aetos Construction Co.	Steve Tassaro, VP; Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources; Ray Huber, VP, Human Resources
Butler Refrigerated Meats, Inc.	Larry Baldauf, VP, Distribution; Michele Reuss, Director, Human Resources; Nathan Book, Specialist, Human Resources; Ray Huber, VP, Human Resources
Giant Eagle, Inc.	Ray Huber, VP, Human Resources; Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources
HBC Service Co.	Larry Baldauf, VP, Distribution; Michele Reuss, Director, Human Resources; Walt Durr, Manager, Human Resources; Ray Huber, VP, Human Resources

OK Grocery	Larry Baldauf, VP, Distribution; Michele Reuss, Director, Human Resources
Pharmacy	Randy Heiser, VP, Pharmacy, Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources
Retail Promotions	Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources; Ray Huber, VP, Human Resources
Tamarkin	Larry Baldauf, VP Distribution; Michele Reuss, Director, Human Resources; Jeannie Kieffer, Manager, Human Resources; Ray Huber, VP, Human Resources
American Seaway Foods	Larry Baldauf, VP Distribution; Michele Reuss, Director, Human Resources; Kelly McCormick, Manager, Human Resources, Ray Huber, VP, Human Resources
Giant Eagle Retail – COD	Jean Colarik, Director, Human Resources; Larane Hulsman, Manager, Employee Relations; Ray Huber, VP, Human Resources

Giant Eagle Retail – POD	Dale Giovengo, Director, Human Resources; Karen Priore, Manager, Employee & Labor Relations; Bruce Fox, Manager, Employee & Labor Relations; Ray Huber, VP, Human Resources
Giant Eagle Retail – COL	Dale Giovengo, Director, Human Resources; Karen Priore, Manager, Employee & Labor Relations; Ray Huber, VP, Human Resources
Giant Eagle Retail – MOD	Dale Giovengo, Director, Human Resources; Kelly Lee, Manager, Employee & Labor Relations; Ray Huber, VP, Human Resources

These persons are also available to discuss any concerns you may have and to provide information to you about our policy on sexual harassment and our complaint process. If for some reason you believe you cannot contact any of the above listed persons, please contact any officer of Giant Eagle.

Sexual Harassment Investigation

When we receive the complaint, we will promptly investigate it in a fair and expeditious manner. The Human Resource Department will conduct all investigations of sexual harassment. The investigation will be conducted to maintain confidentiality to the extent

practicable. Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of the investigation. It may be necessary to suspend an employee pending investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct and where it is appropriate we will also impose disciplinary action.

Giant Eagle will not tolerate job-related sexual harassment. Furthermore, any form of sexual harassment must not be sanctioned or accepted by any employee of the Company. All employees are responsible for maintaining a workplace free from sexual harassment. Managers, supervisors and employees are obligated to promptly report incidents of sexual harassment to Ray Huber, Vice President Human Resources or your Human Resource Manager.

Disciplinary Action

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate. Such action may range from counseling to termination from employment and may include such other forms of disciplinary action as

we deem appropriate. This policy sets forth our goal of promoting a workplace that is free of sexual harassment. The policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct, which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment.

WORK RULES/PROHIBITED ACTS POLICY

Summary

The orderly and efficient operation of the store requires that employees maintain proper standards of personal conduct at all times. Proper standards of conduct are necessary to protect the health and safety of all employees, to maintain uninterrupted production and to protect the Company's goodwill and property.

Giant Eagle sets forth is established work rules which, together with all other proper standards of conduct, employees are required to obey.

I. Any of the following may subject an employee to Company disciplinary action, up to, and including, termination.

1. Customer complaints.
2. Careless work and/or cash shortage.
3. Tardiness or absenteeism.
4. Smoking or consumption of food or drink other than at authorized time (food purchases must have sales slip attached).

5. Practical jokes or horseplay.

6. Disobeying safety instructions.

7. Failure to report injuries immediately to store management.

8. Failure to punch his/her own time card at starting time, lunch, breaks and quitting time.

9. Creating or contributing to unsanitary conditions, poor housekeeping or failure to comply with county, state and USDA rules and regulations.

10. Failure to cooperate with and/or submit to security checks on Company premises.

11. Unauthorized solicitation of employees or unauthorized distribution of literature

II. The following is a partial list of violations that may be cause for immediate termination.

1. Misuse or unauthorized removal or appropriation of property belonging to the Company, another employee or customer.

2. Off-duty drug trafficking.

3. Falsifying any reports or records or providing false information, including time records and employment applications.

4. Indecent behavior while on store premises.

5. (a) Drinking or possession of intoxicating liquor on Company property.

   (b) Bringing in, having in possession, using, transferring or selling any form of narcotic and/or drug on Company premises at any time.

   (c) Under the influence of alcohol or drugs during work shift.

6. Abuse or destruction of Company, customers' or fellow employees' property.

7. Gross discourtesy or use of profanity toward customers or employees.

8. Presence of any unauthorized personnel in the pharmacy area or Eagle's Nest area.

9. Coupon stuffing: Improper use of coupons including Catalina coupons and coupons designed or intended for another person.

10. Use of your personal Giant Eagle Advantage Card® for customers' purchases.

11. Violation of the federal, state or local guidelines in regard to the sale of alcoholic beverages, tobacco or lottery sales.

12. Failure to accurately register sales.

13. Gross insubordination or refusal to follow supervisor's orders.

14. Provoking, instigating or participating in any act or violence, fighting or brawling.

15. Unauthorized stopping of work before scheduled lunch period or scheduled quitting time.

16. Leaving work without the permission of your manager.

17. Sleeping on duty.

APPENDIX D

PETITIONER'S INITIAL GRIEVANCE

[LOGO] **880 *UFCW***

United Food & Commercial Workers Union Local 880

[Names And Addresses Omitted In Printing]

July 13, 2004

Ms. Jean Colarik
Giant Eagle – Cleveland Division
5300 Richmond Road
Bedford Heights, Ohio 44146

RE: MATTHEW CRAIG

Dear Ms. Colarik:

Enclosed is a copy of a grievance from the above-captioned member. It is self-explanatory.

Please respond, upon receipt of this letter, in order to resolve this matter.

Very truly yours,

UFCW LOCAL 880

/s/ Samuel J. Barber
Samuel J. Barber
Union Representative

SJB/kac

Enclosure

Matthew A. Craig
11325 Cheyenne Trail, Suite 302
Parma Heights, OH 44130
Home Phone 440-888-2280

July 12, 2004

Jean Colarik, Human Resources Director
Giant Eagle, Inc.
5300 Richmond Road
Bedford Heights, OH 44146

GRIEVANCE UNDER COLLECTIVE BARGAINING AGREEMENT

The following statements are made pursuant to the grievance procedure contained in Article XV of the Collective Bargaining Agreement (hereinafter "the Agreement") by and between Cleveland Food Industry Committee (hereinafter "the Committee") and United Food & Commercial Workers Union Local No. 880 (hereinafter "the Union"), effective September 9, 2002, and expiring September 11, 2005:

Background Facts

1. Riser Foods Company, doing business as Giant Eagle, Inc. (hereinafter "GE"), is a member of the Committee and is subject to the Agreement.

2. Matthew A. Craig (hereinafter "Employee") was hired as a Part-Time Grocery Clerk by Giant Eagle #0185, Middleburg Heights, Ohio (hereinafter "Employer"), and began work on July 27, 2003.

3. Employee was regularly employed by Employer until his termination on July 1, 2004.

4. Upon hire, Employee entered into the Agreement and became subject to the provisions thereof.

5. Up until the time of the occurrence of the events that have caused this formal grievance to be brought, Employee had never been subjected to disciplinary action by Employer.

6. During the term of his employ, Employee received several awards and pay increases for service to the Employer beyond that which was required.

7. During the later part of March, 2004, Employee was promoted to the "Manager in Charge" position and regularly served as closing manager for the store until his demotion on June 25, 2004.

8. Employee received a pay increase soon after and corresponding to being promoted to the "Manager in Charge" position.

Grievances

9. On July 1, 2004, Employee was wrongfully discharged in violation of public policy when Employee was discharged:

   a. After having suggested on the previous day during a voluntary meeting with Larane Hulsman, Manager of Employee Relations/ Recruiting, that he might seek legal redress for defamatory statements made against Employee by other employees of GE and;

b. After having outwardly manifested an intent before Dennis Hummel, Store Manager of store #0185 (hereinafter "Hummel'), Jackie Lenson, Human Resources Manager for store #0185 (hereinafter "Jackie"), and a union steward on June 28, 2004, to file sexual harassment charges against Hummel and other management of store #0185 based on management's regular use and condolence of sexually explicit profanity, jokes, and other language and;

c. After having complained of the current manner in which GE management and human resource personnel handle sexual harassment claims made against employees and advocating the need for GE management to change its criteria for assessing the legitimacy of sexual harassment claims as well as the manner in which GE "processes" such claims so that countless other employees would also not be made to defend unwarranted claims nor be unfairly condemned by GE management or human resource personnel prior to the conclusion of an investigation into a claim having merit. Employee's assertions regarding these unacceptable employment conditions were made to human resource personnel, Hummel, and a union steward on several occasions, including June 25, 2004, June 28, 2004, and June 30, 2004.

10. Termination of Employee on July 1, 2004, was also in violation of Article IV, section 11(a) of the Agreement and in violation of GE's own policy regarding termination for just cause.

11. Employer has failed to provide Employee with one week notice or wages equal to one week's pay upon his termination, in violation of Article V, section 13 of the Agreement.

12. Employer has refused to provide Employee, in writing, the basis for Employee's demotion from the "Manager in Charge" position on June 25, 2004.

13. Employer has continually refused to allow Employee to examine written statements by other employees who have made allegations against Employee which have materially and adversely affected Employee's status and reputation.

14. Jackie refused to accept Employee's oral claim of sexual harassment by management of store #0185, on June 28, 2004, in violation of GE's own sexual harassment policy.

15. Employer has failed to remit earned wages to Employee for weeks ending June 26, 2004, and July 3, 2004.

16. Employer has failed to remit mileage reimbursement for expenses incurred by Employee on June 30, 2004, when traveling from Employer to Giant Eagle offices located in Bedford Heights, Ohio, for a scheduled meeting.

17. Employer told Employee that Employee would only be permitted a half an hour lunch break when serving as "Manager in Charge", in violation of Article III, section 8 of the Agreement.

18. Employer has continuously failed to post work schedule by 1:30 P.M. on Friday as required by Article III, section 13 of the Agreement.

19. Employer has violated of Article III, section 9 of the Agreement on several occasions as it concerns the Employee.

Demand for Relief

WHEREFORE, Employee demands the following:

a. Reinstatement of his employment position.

b. Lost wages incurred by Employee for weeks ending July 3, 2004, and July 10, 2004, as a result of the violations set forth in paragraphs 9 and 10.

c. Wages to which Employee is entitled as set forth in paragraph 11.

d. The granting of documentation requests made by Employee but which have previously been rejected, as set forth in paragraphs 12 and 13.

e. Remittance of wages earned by Employee for weeks ending June 26, 2004, and July 3, 2004.

f. Remittance of mileage reimbursement for expenses incurred by Employee as set forth in paragraph 16.

g. Any other relief that is fair and just.

MATTHEW A. CRAIG

/s/ Matthew A. Craig

cc: Sam Barber, UFCW Union Local 880, 2828 Euclid Avenue, Cleveland, OH 44115

APPENDIX E

SUMMARY OF PERTINENT COLLECTIVE BARGAINING AGREEMENT, SEXUAL HARASSMENT POLICY, AND WORK RULE PROVISIONS

Article II, Management Rights

In addition to the management rights specified elsewhere in the Agreement, the management of the business and the direction of the work force, including, but not limited to the right to plan, direct, and control store operations; to establish merchandising and pricing policies; to hire, suspend, or discharge for just cause; to assign and allocate work; to transfer employees because of lack of work or for other legitimate reasons; to study or introduce new or improved methods or facilities; to establish and maintain reasonable rules and regulations covering the operation of the store; and to carry out the ordinary and customary functions of management are vested exclusively in the Employer, except to the extent modified by this Agreement, and provided further, that the Employer shall not exercise such rights in an arbitrary or capricious manner.

Article IV, Working Conditions

Section 5.

The Employer may require employees to initial Employer policy and rules to verify that those policies and rules have been read and that the employees are familiar with their contents. Employer policies and rules which employees are required to initial shall be posted in each store and furnished to the Union upon request.

Section 11(a).

No employee shall be disciplined or discharged without just cause.

Article V, Seniority

Section 8.

Seniority shall be terminated or broken for the following reasons:

a. Voluntary quit;

b. Discharge for cause;

c. Layoff exceeding twelve (12) consecutive months;

d. Failure to report for work within three (3) days after receipt of a written recall notice;

e. Reduction from full-time to part-time status for more than one (1) year (but such an employee's part-time seniority shall be measured from his or her last date of hire).

Article XV, Grievance Procedures

Section 1.

Should any dispute or grievance arise under this Agreement, it shall be settled in accordance with the procedure set forth in this Article, and, except as otherwise specifically provided in this Agreement, this procedure is the sole and exclusive method of disposing of such grievances.

Section 3.

The arbitrator's decision shall be issued within thirty (30) days after the dispute or grievance is submitted to the arbitrator and shall be final and binding upon the Employer, the Union, and the employee or employees involved. The expenses of the arbitrator shall be borne equally by the Employer and the Union.

Section 5.

In the event a grievance goes to arbitration, this Agreement, including any Supplements or Addenda, shall be the basis on which the arbitrator's decision is rendered, and in reaching his or her decision, the arbitrator shall have no authority to amend, modify, or in any way change its terms.

EMPLOYEE HANDBOOK

Work Rules/Prohibited Acts Policy

Summary

The orderly and efficient operation of the store requires that employees maintain proper standards of personal conduct at all times. Proper standards of conduct are necessary to protect the health and safety of all employees, to maintain uninterrupted production and to protect the Company's goodwill and property.

Giant Eagle sets forth its established work rules which, together with all other proper standards of conduct, employees are required to obey."

II. The following is a partial list of violations that may be cause for immediate termination.

13. Gross insubordination or refusal to follow supervisor's orders.

EMPLOYEE HANDBOOK

Sexual Harassment Policy

Summary

Giant Eagle will promote a workplace that is free of sexual harassment.

Giant Eagle is committed to providing a workplace free of sexual harassment, Sexual harassment of employees in the workplace or in other settings in which employees may find themselves in connection with their employment is unlawful and will not be tolerated. Further, any retaliation against an individual who has complained about sexual harassment or retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is similarly unlawful and will not be tolerated. To achieve our goal of providing a workplace free from sexual harassment, the conduct that is described in this policy is prohibited. If such conduct does occur, a procedure to investigate reported incidents has been established and communicated to employees.

Giant Eagle takes allegations of sexual harassment seriously and we will respond promptly to complaints of sexual harassment. Where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary including disciplinary action up to, and including, termination.

Definition of Sexual Harassment

Sexual harassment includes unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature when:

- Submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or a basis for employment decisions.
- Such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.
- Any unwelcome E-mail communication or viewing, downloading or transmitting sexually explicit or offensive material from the Internet also constitutes creating a hostile work environment.

Under these definitions, direct or implied requests by a supervisor for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits or continued employment constitutes sexual harassment.

The legal definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating or humiliating to male or female workers, whether it is intended or not, may

also constitute sexual harassment. While it is not possible to list all examples of sexual harassment, the following list contains additional types of conduct, which, depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness may constitute sexual harassment:

- Unwelcome sexual advances – whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life, commenting on an individual's body, commenting about an individual's sexual activity, deficiencies or prowess;
- Displaying sexually suggestive objects, pictures, cartoons, etc.;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments; and
- Inquiries into one's sexual experiences.

Retaliation against an individual who has complained about sexual harassment and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated.

Complaints of Sexual Harassment

If any employee believes that he or she has been subjected to sexual harassment, the employee has the right to file a complaint with our organization. This

may be done in writing, or orally, by contacting Ray Huber, Vice President, Human Resources or anyone on the list below:

Giant Eagle Retail – COD: Jean Colarik, Director, Human Resources; Larane Hulsman, Manager, Employee Relations; Ray Huber, VP Human Resources.

Sexual Harassment Investigation

When we receive the complaint, we will promptly investigate it in a fair and expeditious manner. The Human Resource Department will conduct all investigations of sexual harassment The *investigation will be conducted to maintain confidentiality to the extent practicable.* Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of the investigation. It may be necessary to suspend an employee pending investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct and where it is appropriate we will also impose disciplinary action.

Giant Eagle will not tolerate job-related sexual harassment. Furthermore, any form of sexual harassment must not be sanctioned or accepted by any employee of the Company. All employees are responsible for maintaining a workplace free from sexual harassment. Managers, supervisors and employees are obligated to promptly report incidents of sexual harassment to Ray Huber, Vice President Human Resources or your Human Resource Manager.

Disciplinary Action

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate. Such action may range from counseling to termination from employment and may include such other forms of disciplinary action as we deem appropriate. This policy sets forth our goal of promoting a workplace that is free of sexual harassment. The policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct, which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment. (emphasis supplied).

APPENDIX F

ARBITRATION DECISION

IN THE MATTER OF
ARBITRATION BETWEEN:

Giant Eagle, Inc.	)	**FMCS #05-51392**
and	)	**Grievant:**
United Food and Commercial Workers Union Local 880	)	**Matthew A. Craig**

APPEARANCES:

For the Company:	***For the Union:***
Mark Webber, Esq.	Todd M. Smith, Esq.
Duvin, Cahn & Hutton	Schwarzwald & McNair
Erieview Tower, 20th Floor	616 Penton Media Building
1301 E. Ninth Street	1300 E. Ninth Street
Cleveland, Ohio 44114	Cleveland, OH 44114

ARBITRATOR:

Patricia Thomas Bittel

Issue: Termination for Insubordination

BACKGROUND

This case was heard March 25, 2005 in Cleveland, Ohio before the neutral arbitrator, Patricia Thomas Bittel, mutually selected by the parties in accordance with Article XV Section 1, Step 4 of the collective bargaining agreement.

Grievant Matthew Craig was hired as a part-time grocery clerk on July 27, 2003. During the latter part of March 2004, he was assigned as manager in charge at his store. On June 25, 2004, this assignment was revoked. On June 30, 2004 Grievant voluntarily went to corporate headquarters to meet the Manager of Employee Relations Larane Hulsman. On July 1 he was terminated for violation of the rules against gross discourtesy and insubordination.

A grievance was filed protesting the termination and raising other claims. A supplemental grievance was filed on July 22 adding to the claims. At a Step Three meeting, the grievance was modified and some of the claims were settled. The case then proceeded to arbitration. The parties stipulated the matter is properly before the Arbitrator for resolution and jointly submitted the following issue: *Was the Grievant, Matthew Craig, discharged on June 30, 2004 for cause under the collective bargaining agreement? If not, what shall be the remedy?*[1] Because the stipulated issue only deals with the termination itself, other issues raised in the grievances are deemed dropped or settled.

DISCUSSION

Human Resources Manager at the Middleburg Heights store, Jackie Lenson, testified that Grievant

[1] Article V §8 provides for termination of seniority where there is discharge for cause.

Matthew Craig was employed at the store when she came in June of 2004. She said that when she arrived she received a few written complaints from the prior HR Manager about Craig, then received three to four additional complaints about his conduct toward other employees. According to Lenson, the complaints claimed he was arrogant, demanding and rude. She said there are three other managers in charge, but she did not receive any complaint about them.

She said she also received a complaint from a 17 year old minor who was offended when Grievant approached him and asked if he liked girls. The minor stated he answered "yes," but later decided that he was offended and uncomfortable, and made a written complaint. Lenson said she discussed the matter with the store manager and told Grievant about it. She recalled Grievant's response was that the complaint was ridiculous and he was only joking around. She said she explained to him that it was considered a complaint of sexual harassment and needed to be investigated. She also told him of complaints that his treatment of employees was unacceptably rude and arrogant.

She said he first denied that he had been rude and arrogant, then said it did not matter if he was, because he was there to tell employees what needed to be done. She said she explained that his perception was wrong, that you cannot be rude and arrogant with employees. Craig was removed as a manager in charge, she said. There was no resulting loss of pay or

hours, she related; because it had not been a promotion.

She said a few days later Grievant came into her office uninvited and demanded a Union steward. She recalled that he opened the conversation stating "Call the Union steward up here." Those were his first words, she said.

She said he slammed down a pile of papers and a handbook on her desk and told her she needed to read the law because she was accusing him of sexual harassment. Lenson said she explained it was a complaint that had to be investigated. She said Grievant began demanding the reasons for his 'demotion' in writing, as well as a list of people who had complained. Lenson said she told Grievant he had no right to talk to her in that fashion. She stated he next demanded supervisors' names, addresses and phone numbers, his personnel file and all the complaints that other employees had lodged. She recalled that he wanted her to stop what she was doing and meet his requests. She said she could not provide access to his personnel file of her own accord, but called and was advised that his store file was not his personnel file, and arrangements could be made for him to see the personnel file. She described him as rude, and said the Union Steward told her Grievant had no right to be demanding in the way he was.

Lenson recalled that the grocery manager reported to her that he was introducing himself to employees, and when he introduced himself to Grievant, he asked

how he was. He said Grievant responded "Not very well," and went on to say he was being accused of sexual harassment. Lenson explained that this was inappropriate because sexual harassment complaints were confidential and this had already been explained to Grievant.

Larane Hulsman testified that she has been with Giant Eagle for 32 years and has worked as the Manager of Employee Relations for about one year She said Jackie Lenson reported to her and advised her of Grievant's breach of confidentiality about the sexual harassment complaint. Hulsman recalled telling Lenson she would like to talk with Grievant and explain to him what the procedures are in an investigation and why it is important that management conduct the investigation. She said she was concerned that it be confidential and that he was discussing it out on the floor. She told Lenson to tell Grievant she was available at 3:00 p.m. if he would like to come in.

The meeting was not mandated, Hulsman said, but Grievant was on the clock at the time. She said Grievant spoke first and described the complaint, stating he did not believe it was sexual harassment. She said he told her about an incident with another employee in the back room who asked him to remove a pallet. He mentioned a dairy manager, then stated that Lenson, the employee who had complained and Store Manager Dennis Hummel should all be removed from the store. Hulsman explained that Hummel had been with the Company for about 30

years and Lenson had been with the Company 15 to 20 years.

After he was done, Hulsman said she began by discussing the situation with the minor. She said she explained that this situation did not constitute sexual harassment, but it was inappropriate to have that type of conversation and in addition, she pointed out it was especially sensitive due to the fact that the other employee was a minor. She said Grievant disagreed with her, and when she explained that his comment had a sexual inference, he held up his hand and smirked, stating "for the sake of argument, I'll agree with you, but you are wrong." Hulsman said she explained that she was not arguing, but he needed to understand the Company position that those types of comments are inappropriate.

She said Grievant continued to disagree, stating "I did not come down here to have you recite Company policy." Then he slammed a book closed and announced that the meeting was over. Hulsman said she responded that she was not reciting Company policy, and she had listened to him, and would like him to listen to her. She said she told him the meeting was not over because she had not concluded her responses. She explained that the meeting would not be over until she said it was, and had had an opportunity to respond. She further stated that she told Grievant if you leave, it's insubordination and a terminable offense." She related that he looked at her for three to five seconds, then went to the door and continued on out. She flatly denied giving him

permission to leave, stating "Nothing I said could be construed that way?

She said after he left, she went into her manager's office and related what had happened. Next, she called the business agent for Local 880, Sam Barber, and advised him of the situation. Then she made a written account of the events.

She described a subsequent meeting where Grievant said he would not go forward with the meeting so long as Lenson was there. She said she had never been involved in a meeting where someone said they would not go forward with a management representative present. She related that the Company ultimately complied with Grievant's request.

Grievant testified that after his hire, he worked 15 to 20 hours a week while attending law school, and received several merit increases. He further stated he has received awards for his work. He asserted that Store Manager Dennis Hummel told him he liked how he was performing his job. He claimed to have received no discipline for attendance, work performance, violation of rules or any other matter. The Union argued that his work was praised and appreciated. The facts establish that Grievant's work was quite good, at least until the point when he became a manager in charge.

Grievant explained that if employees did not follow his directions as manager in charge, he would try to "coerce" them to do so. He said if they refused, he would progressively get more direct with the final

option being to send an employee home. He claimed there was only one occasion when he had to send an employee home. He gave examples of trying to coerce employees when they balked at his direction. In one of his examples, an employee complained that she could not get to her stuff because a pallet needed to be moved and she asked him to move it. He said he responded that she should move it herself because he did not have time, then he pointed out there was plenty of room for her to get past it. Despite his articulated lack of time, he then went to get a camera to take pictures of the area to substantiate his viewpoint. Rather than help an employee, he entered into a conflict with her, and rather than take the time to move the pallet, he took pictures of it.

He recalled meeting with Lenson and Hummel, and learning about the complaints made against him. He said he asked what incidents she was referring to in terms of the complaints, but her response was vague and she gave no specifics.

He said he wrote a list of things he wanted from Lenson, stating he asked for his personnel file, Lenson's supervisor's contact information, information about the reason for his 'demotion,' and the substance of the complaints against him. He denied slamming anything, stating he used a tossing motion. He admitted telling Lenson she needed to read the court cases and administrative regulations he had collected, because his actions did not constitute sexual harassment under the law. He related that she just pushed them aside and did not seem to care. He recalled she

said she needed to talk to a supervisor about the personnel file. Grievant said he asked if she could call now, stating he asked, but did not demand. He said he was ultimately denied the documents.

He acknowledged that Lenson told him she did not like the way he was talking to her, but would look into his requests and contact her supervisor. He admitted that Hummel told him he did not appreciate how he spoke to Lenson and did not like his attitude at the meeting. He conceded that Hummel thought his conduct was unwarranted. These facts establish that more likely than not, Grievant was disrespectful and overbearing towards Lenson and did not listen to or hear Lenson's comments. His version of events demonstrates that Grievant was not receptive to managerial guidance and was either unwilling or unable to acknowledge management's perspective.

He recalled that on June 30 he was called into the office and offered an opportunity to speak with Larane Hulsman. He said he was told he would be paid mileage plus his hourly rate and travel time. He said he accepted. He said when he met with Hulsman, he told her what had happened. He said he explained that he thought the sexual harassment allegation was ludicrous. He recalled she responded that while it was not sexual harassment, but was improper, and because a minor was involved, "We needed to be more careful."

She asserted his comment had sexual undertones, he said, stating he disagreed with her about

that and meant nothing sexual by the remark. He said this point was debated for awhile, then he told Hulsman he came to talk about how the investigation was going, but she was just telling him policy. He said he got up to go, but she told him not to walk out because she was not done. He recalled that she warned him that leaving would be insubordination, a terminable offense. He said he stopped and started arguing the whole thing over again, stating "What's the point of arguing, we aren't getting anywhere? Finally, after more arguing, she became flustered, he claimed, and told him "Fine, go, just go." He said he turned and walked out the door.

Grievant said his meeting with Hulsman was voluntary and he also acknowledged that he told Hulsman that Lenson and the minor should be removed from the store. He did not recall saying that Hummel should. He felt the minor employee should be disciplined for making a false accusation, though he acknowledged that people have a right to file a complaint if they feel harassed. In this instance, Grievant took it on himself to make unsolicited recommendations about personnel placement despite the fact that he was not a manager and had no responsibility for human resources.

Grievant said he was not pleased with the extent of the investigation. He admitted Hulsman let him complete everything he had to say before she began her response. He acknowledged closing his binder and saying that the meeting was over. Here again, he took it upon himself to try to control the meeting and

usurp Hulsman's role as the manager. Significantly, he refused this opportunity to listen and learn.

Union Representative Sam Barber testified to cases he perceived as disparate treatment. However, on cross examination he admitted to distinctions in that the cases he cited involved failure to follow directions, not willful insubordination. He also acknowledged that Human Resources does have the authority to fire someone. He recalled receiving a call from Hulsman stating an employee from the Middleburg Heights store announced a meeting was over and left, despite a warning that this would constitute insubordination, a terminable offense.

The concept of insubordination has been refined by arbitrators over the course of many years, and the burden rests on the Employer to establish the elements of insubordination.

> Generally, employees must follow orders given by a superior, although they may later challenge the propriety of the order through the established grievance procedure. As one arbitrator put it: '[T]o permit employees to willfully disregard a direct order would result in chaos.' Insubordination is the refusal by an employee to work or obey an order given by the employee's superior. In most instances, any employee who refuses to work or obey now (and grieve later) is considered 'insubordinate.' This basic definition, however, is subject to at least six qualifications.

First, an employee's refusal to work or obey must be knowing, willful, and deliberate. Mere negligence in performing one's duties is not insubordination.

Second, the order must be both explicit and clearly given, so that the employee understands both its meaning and its intent as a command.

Third, the order given must be both reasonable and work related. The employee need not be on duty to be found insubordinate, provided the employee's conduct injuriously affects his employer's business.

Fourth, the order must have been given by someone with appropriate authority, and the employee must have understood that person to possess that authority.

Fifth, the employee must be made aware of the consequences of failing to perform the work or follow the directive. For example, an employer improperly suspended an employee for insubordination because the employee took 2 days off to be with his child for her surgery. The employer denied his request for leave, offered to allow the employee to use vacation time, but failed to tell him he would be disciplined if he took the days off.

Finally, if practical, the employee must be given or have time to correct his purportedly insubordinate behavior. For instance, a discharge for insubordination was overturned

> where an employee requested a different assignment after he was told at the end of his shift that the next day he would be assigned to inventory duty. His supervisor refused the request, commented on his poor attitude, and discharged him. The arbitrator found the employee had not been given an opportunity to report the next day and perform the job assignment, nor the opportunity for sober reflection.[2]

Arbitrators have sustained insubordination charges for refusing to attend or interrupting a Company meeting.[3] The Union argues that the quantum of proof should be clear and convincing evidence. However, the prevalent view at labor arbitration is that the appropriate standard is preponderance of the evidence. The higher standard is not generally used unless criminal or stigmatizing conduct has been alleged, and even then, many arbitrators stick to preponderance as the appropriate standard.[4]

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[2] Brand, Discipline and Discharge, (BNA Books, 1998) 155-156

[3] Ermanco, Inc., 101 LA 269 (Ellman, 1993). *See also*, Valley Hosp. Ass'n, 97 LA 661 (Calhoun, 1991); Scovill, Inc., 84 LA 201 (Storey, 1985); American Can Co., 57 LA 1063 (Kerrison, 1971).

[4] [M]ost arbitrators apply the 'preponderance of the evidence' standard to ordinary discipline and discharge cases "(Elkouri & Elkouri, How Arbitration Works, 6th Ed. (BNA Books, 2003) 950. An example of stigmatizing conduct would be child abuse by a teacher. Grievant's conduct was neither criminal nor stigmatizing.

Hulsman's version of events on June 30 cannot be reconciled with Grievant's. Either she gave him permission to leave or he left despite her instruction to stay. The Company's ability to prove the elements of insubordination rests on whether Grievant was given permission to leave. Hence, relative credibility must be examined.

The Union has argued that Grievant, as a disgruntled employee or Union member, is not inherently any less credible than management.[5] By contrast, the Company maintains that Grievant's evident interest in the outcome of the case constitutes bias, making him the less credible witness. Before relying on status as an indicator of reliability, the Arbitrator prefers to evaluate content of testimony as an indicator of reliability.

Grievant had not been employed for an entire year at the time of the events here concerned. When advised that other employees had complained of his rude and arrogant behavior, he first denied such conduct, then argued that even if he had been rude it did not matter. These two responses are not harmonious.

Grievant asserted that he did not know that Hulsman had authority to fire him, but thought the only person who could fire him was the store manager. He explained there was no reason for him to

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[5] Union Brief p. 13.

think that Human Resources could fire him because he never took direction from them. This argument is a red herring. Hulsman, as Manager of Employee Relations, would naturally be involved in termination decisions. Even if Grievant did not understand this apparent reality, he knew or should have known that unacceptable conduct would be reported and acted upon by others. Any confusion on this point was certainly clarified when Hulsman advised Grievant that departure would constitute insubordination, a terminable offense. At that point, her authority to terminate Grievant had been plainly expressed. It follows that Grievant's claimed ignorance of her authority is incredible on its face and erodes the reliability of his other testimony.

The Union argues that Hulsman's testimony was flawed by inconsistency. It notes she said she claimed to have initiated the meeting because of confidentiality concerns, though no mention is made of this in her notes. However, Hulsman did not get to finish making her points, so she did not reach the confidentiality issue and had no note to make regarding any discussion of confidentiality. The Union also points out that she said she did not check to see whether Grievant was scheduled to work the next day, though her notes indicate she did. This point does not involve the exchange between Grievant and Hulsman. Such a minor inconsistency is not sufficient to demonstrate that Hulsman's recollection of Grievant's insubordinate departure was unreliable.

It is telling that Hulsman immediately reported the insubordinate departure both to her superior and the Union. This reaction is consistent with the shocking impact of Grievant's conduct, and with Hulsman's surprise that Grievant would leave after her explicit warning. There is absolutely no logical or credible explanation for her reaction unless Grievant did walk out without permission.

Hulsman was a high ranking administrator in the Company's organization and a professional in dealing with issues of employee conduct. She had no axe to grind with Grievant and no preexisting bias, having only just met him. She was trying to make him understand why his comment to the minor was inappropriate. It contravenes logic for her to tell him to go when she had not yet been able to get any acknowledgment from Grievant that he understood.

If Hulsman had given Grievant permission to leave as he claims, she would have no reason to report him as insubordinate. Indeed, it would be completely illogical and nonsensical to tell an employee to leave, then report him as having been insubordinate for doing so. Taken together, these facts and considerations support the conclusion that Hulsman's testimony is more reliable than Grievant's, and should be credited.

The Union argues that Grievant did not refuse to perform work. However, he was on the clock and met with Hulsman at the Company's expense. His work at that point was to meet with Hulsman, explain his

concerns and come to a better understanding of the Company's approach to employee complaints. The business purpose was to improve his understanding of complaint handling and investigation as well as his sense of workplace propriety. Grievant refused to perform this work.

By leaving despite an explicit instruction, Grievant knowingly, willfully and deliberately refused to obey Hulsman's instruction. Her order was explicit and clear so that Grievant understood he was being instructed to stay. The order was reasonable and work related. Hulsman was trying to explain why Grievant's conduct was of concern, and he had given no indication of understanding. The order was given by someone with appropriate authority, as Hulsman was an administrator in Human Resources. She made it clear that if he left he would be committing a terminable offense. Despite the clarity of the warning, he consciously put his employment at risk. Hulsman's warning gave Grievant an adequate opportunity to correct his insubordinate behavior. It was his decision to walk out the door after her warning. The evidence has established all the elements of insubordination and satisfies the Employees burden of proof.

The Union maintains that insubordination was treated casually at Giant Eagle, and Grievant was the victim of disparate treatment. However, many of the examples offered to support this allegation were of employees failing or refusing to follow Grievant's orders as manager in charge. These examples are

inapposite because they do not involve refusals to follow orders from a manager or supervisor. There is no insubordination unless the order comes from a superior. Grievant was not his co-workers' supervisor when they balked at his direction. The other examples offered were of failures to follow instructions, and did not entail the willful, deliberate defiance of managerial authority evident in Grievant's case. The evidence therefore fails to demonstrate disparate treatment.

More likely than not, Grievant left Hulsman's office after being told that the meeting was not over and that departure would constitute insubordination, a termination offense. His attitude at the time was not one of listening to Hulsman, or properly respecting her. Rather, he accused her of simply reiterating policy to him and described the meeting as useless when she was explaining the Company's need to investigate complaints.

The concept of just cause functions to protect the employment relationship where progressive discipline can be instrumental in helping the employee to assimilate and meet the employer's reasonable expectations. The evidence in this case gives no indication whatsoever that Grievant could or would benefit from progressive discipline. He has not heeded any warning given by either Lenson or Hulsman. He has not so much as acknowledged any suggestion that he modify his behavior. At every turn he has turned a deaf ear to any critique of his conduct on the job. The

Arbitrator is persuaded that progressive discipline would be of no use in Grievant's case.

The Union asserts Grievant's due process rights were violated because there was no full and fair investigation. However, the insubordination here concerned was directed at the Manager of Employee Relations, that is, the person with responsibility for reviewing termination decisions. In such a situation, there is no need for further investigation and review.[6] Even so, Hulsman immediately apprised her superior of the situation.

The Union strongly argues that discharge is too severe a penalty in this case because there were no threats, abusive language, violence, refusal to work or other observers. Certainly, the penalty in a just cause analysis must be proportionate to the seriousness of the offense. Direct insubordination to a manager is extremely serious when it utterly prevents the Company from carrying on its business. In this case, when Grievant walked out, Hulsman was completely blocked from finishing her business of counseling him. His departure was in the face of a specific warning that discharge would be the likely consequence. Hence, Grievant's departure was an act of defiance and a direct challenge to Hulsman's authority. As such, it was very serious in nature. Grievant's record of employment, though initially good, is not long enough to constitute a mitigating circumstance.

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[6] Ermanco, Inc., *supra* n.3.

The Union has vigorously mounted a highly competent and thorough challenge to Grievant's termination. The case, however, turns on a credibility determination. The Arbitrator has carefully observed witness demeanor at hearing and evaluated testimony, and finds Hulsman to be the more credible witness.

AWARD

Grievant Matthew Craig was discharged for just cause under the collective bargaining agreement. The grievances are denied.

Respectfully Submitted,

/s/ Patricia T. Bittel

Patricia Thomas Bittel,

Arbitrator

Dated: June 22, 2005